IN THE

Supreme Court of the United States

NO. 75-736 OCTOBER TERM 1975

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

DUQUESNE LIGHT COMPANY, PENNSYLVANIA POWER COMPANY AND OHIO EDISON COMPANY,
Respondents

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, DUQUESNE LIGHT COMPANY, ET AL., IN SUPPORT OF IMMEDIATE CONSIDERATION OF PETITION FOR CERTIORARI, GRANT OF CERTIORARI, AND ACCELERATED ARGUMENT

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OPINION

The Opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 522 F.2d 1186.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

Statute Involved.

QUESTION PRESENTED

Where the record shows that a state did not give serious consideration to the technological or economic feasibility of compliance with an emission limitation contained in a state implementation plan submitted under §110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), is the Administrator of the Environmental Protection Agency required to approve the emission standard without regard to whether the emission standard is a technically and economically feasible means of attaining ambient air quality standards

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STATUTE INVOLVED

Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), is set forth in Petitioner's Appendix B.

Statement.

STATEMENT

Section 109 of the Clean Air Act, as amended, 84 Stat. 1679, 42 U.S.C. 1857c-4, provides that the Administrator of the Environmental Protection Agency (hereinafter "EPA") should promulgate ambient air quality standards for substances to be determined by him. Ambient air quality standards are both "primary" and "secondary". Primary ambient air quality standards are intended to be those requisite to protect the public health; secondary ambient air quality standards are those necessary to protect the public welfare, in both cases with an adequate margin of safety. Section 110(a)(1) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(1), provides that each state within a specified period of time after the promulgation of ambient air quality standards must submit a plan for the implementation, maintenance and enforcement of the ambient standards. These submissions by the states are commonly referred to as implementation plans. Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), provides that within four months after the submission of an implementation plan the Administrator shall decide whether to approve its provisions. Upon approval the implementation plan becomes enforceable by the federal authorities under specified conditions. The sanctions include civil and criminal remedies with fines of up to $25,000 per day. Also the provisions of approved implementation plans can be enforced in the federal courts by private individuals and entities under §304 of the Clean Air Act, as amended, 84 Stat. 1706, 42 U.S.C. 1857h-2.

To guide the states in developing implementation plans, the Administrator published regulations for their preparation. 40 CFR Part 51. Appendix B to those regu-

lations was titled, "Examples of Emission Limitations Attainable with Reasonably Available Technology" ("Examples").

On January 27, 1972 the Commonwealth of Pennsylvania submitted its implementation plan to the Administrator. The provision applicable to Respondents here limited sulfur oxides emissions from the facilities of Respondents to half the level described in the Examples referred to above.

On May 31, 1972 the Administrator approved the Pennsylvania Implementation Plan, thus giving the Pennsylvania standard in question the force of a substantive federal regulation. As a result, the Respondents were exposed to penalties under the Clean Air Act for violation of the regulation and to citizen suits in the federal forum to enforce the regulation against them. Therefore, on June 26, 1972, the Respondents filed a Petition for Review in the Court of Appeals for the Third Circuit pursuant to §307(b)(1) of the Clean Air Act, as amended, 84 Stat. 1707, 42 U.S.C. §1857h-5(b)(1), with regard to the action of the Administrator in approving the provision of the Pennsylvania Implementation Plan in question.

On November 14, 1972 the Respondents filed a Motion to Remand the matter to the EPA for a hearing because of the failure of EPA to comply with the requirements of the Administrative Procedure Act, as amended, 80 Stat. 381 et seq., 5 U.S.C. 551 et seq., and procedural due process in approving the Pennsylvania Implementation Plan. On January 22, 1973 the Court of Appeals entered its order remanding the matter to EPA. Thereafter EPA filed a motion for clarification of the scope of the remand. On June 5, 1973 the Court of Appeals in an opinion reported as *Duquesne Light Co.*, et al. *v. EPA*, 481 F.2d 1, ("Duquesne I") gave EPA instructions either to stay the effectiveness of the Pennsylvania Implementation Plan as a federal regulation while the Respondents exhausted their state remedies or to conduct hearings, in which Pennsylvania and the Respondents would participate, with regard to the technological and economic feasibility of the provisions of the Pennsylvania Implementation Plan in question. The EPA chose to hold its own hearings and did so on November 26, 1973 and January 16, 1974. Contrary to the procedure contemplated by the order of the Court of Appeals, Pennsylvania did not actively participate. On March 29, 1974 EPA filed a decision holding that the provisions of the Pennsylvania Implementation Plan in question were economically and technologically feasible. The Respondents sought a further remand on the ground that EPA in its administrative decision relied on materials which had not been available at the time of the hearing and upon which the Respondents had no opportunity to comment. The Court of Appeals granted the request of the Respondents for a second remand and a further hearing was held before EPA on July 30, 1974. On September 17, 1974 EPA rendered its second administrative decision holding the provisions of the Pennsylvania Implementation Plan in question technically and economically feasible. The Respondents sought further review of this decision in the Court of Appeals for the Third Circuit which on August 21, 1975 issued its decision holding that the conclusion of EPA that the provisions of the Pennsylvania Implementation Plan in question were technologically and economically feasible on the basis of the record before the EPA was arbitrary and capricious. The Court of Appeals remanded the matter to EPA for further hearings. It is this decision which is the subject of the present Petition for Certiorari.

ARGUMENT

The Court should not defer consideration of the Petition for Certiorari in this matter. Instead the Court should grant the Petition of the Solicitor General for Certiorari and affirm the decision of the Court of Appeals for the Third Circuit. We respectfully suggest that the Court should either consolidate this case for argument with the case of *Union Electric Co. v. EPA*, No. 74-1542, Petition for Certiorari granted October 6, 1975, or advance this case ahead of the *Union Electric* case on the Court's argument list.

The Court should grant certiorari in this matter because it has previously granted certiorari in *Union Electric Co. v. EPA*, No. 74-1542, where one of the principal grounds advanced for granting certiorari in the Petition was the conflict with the decision of the Court of Appeals for the Third Circuit in *Duquesne Light Co., et al. v. EPA*, 481 F.2d 1 (3rd Cir. 1973) ("Duquesne I" and *St. Joe Minerals Corp. v. EPA*, 508 F.2d 743 (3rd Cir. 1975). The present case ("Duquesne II") is based on the same interpretation of the Clean Air Act as the prior decisions of the Court of Appeals for the Third Circuit.

The Court should consolidate the present case for argument with the *Union Electric* case or advance it ahead of the *Union Electric* case for argument because the record in the present case is much more complete than *Union Electric*. In the *Union Electric* case the Court of Appeals noted the complete absence of an agency record. In *Duquesne Light II* there is an extensive administrative record which shows the role the EPA allocated to considerations of technological and economic feasibility. The record will also assist the Court in evaluating the practical implications of the alternatives

with regard to the construction of the Clean Air Act which are at issue here. In addition, in a case where the Court is being asked to choose between the interpretations of the Clean Air Act by the Eighth Circuit or the Third Circuit or to choose still another course, it will be helpful to the Court to have the benefit of argument from counsel involved in the Third Circuit proceedings.

In his Petition for Certiorari the Solicitor General has argued that the outcome of the present case would be controlled by *Union Electric* if *Union Electric* were decided first. Thus if the present case is not considered at the same time as *Union Electric,* Respondents will be deprived of the opportunity to present their contentions with regard to the proper construction of the Clean Air Act to this Court.

In order to expedite this matter so that it can be consolidated with the *Union Electric* proceeding without undue delay, we have filed this response prior to the time by which it is required under the Rules of this Court.

CONCLUSION

For the above reasons consideration of the Petition for Certiorari should not be deferred. On the contrary certiorari should be granted promptly. The present case should be considered on the merits at the same time as or prior to the *Union Electric* case, and the opinion of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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Dated: December 18, 1975